

ANALYSIS OF THE LEGAL ISSUES INVOLVED IN ELECTRONIC CONTRACTS UNDER INDIAN LAW WITH REFERENCE TO BUSINESS-TO-CONSUMER MODEL OF E-COMMERCE

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With the progress in technology the standard contract has become technically complex and consequently, difficult to comprehend by an average consumer thereby further limiting her/his choices. Often, especially in the cyberspace, such contracts contain terms that are drafted to reduce the liability of manufacturer or distributor if anything goes wrong. In light of the specific characteristics e-contracts have acquired, the pressures such contracts have put on freedom of contract, and the viability and proliferation of standard form of contracts in the cyberspace, the present paper discusses the legal provisions applicable thereto in business-2-consumer e-commerce model, especially from consumer's perspective. The paper argues that the present Indian law is inadequate to protect the rights and interests of consumers with respect to breach of B-2-C electronic contracts.

I. INTRODUCTION

The digital age has paved numerous ways to make an ordinary day in an average internet user's life more comfortable than ever. Today, with a few clicks consumers can order electronic goods and receive them at their doorstep, book travel tickets, send gifts, order food and much more. No longer there is a need to stand in queues at the bank for basic transactions. However, with every new click, the consumer, or better referred hereto as the 'e-consumer,' is binding himself to a set of terms and conditions, mostly, unknowingly. Electronic contracts or e-contracts are generally standard forms of contracts that have non-negotiable standardised terms formulated by one party, often the manufacturer/distributor, or service provider, giving, in most cases, limited to no choice to the consumer to negotiate any contract term.

The present paper involves an analysis of the legal issues involved in formation of electronic contracts, including remedies for their breach. It tests the possible scope of applicability of traditional principles of Indian Contract Law as prevalent in the physical world, to electronic contracts. The paper begins by a brief study of formation of a contract under the Indian Contract Act, 1872. It proceeds to analyse the competence of the Indian Contract Law in dealing with electronic contracts highlighting the pitfalls. This is followed by a discussion of the provisions of the Information Technology Act, 2000 as applicable to electronic contracts. Next, the paper discusses practical issues that consumers face if e-contracts are not honoured as promised. Then the paper presents remedies available to an e-consumer under the Indian Contract Act.² Lastly, the analysis concludes that the current Indian Law is not fully equipped to appropriately respond to the problems of e-consumers.

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The paper proposes to answer questions relating to liability of service provider/distributor/ manufacturer under the Indian Contract Laws; and also the remedies available with the ordinary consumer in cases of breach of e-contracts in the business-2-consumer³ model of e-commerce, in the form of non-delivery of goods, incomplete delivery of goods, one-sided rescission of contract etc. under Indian laws and in the absence thereof, explores the scope for introducing legislative changes.

II. ELECTRONIC CONTRACT AND ITS CONFLICT *VIS-À-VIS* INDIAN CONTRACT LAW

A. FORMATION OF TRADITIONAL OFFLINE CONTRACT UNDER INDIAN LAW

Contract law in India is governed by the provisions of the Indian Contract Act, 1872⁴. However, the Act only provides a set of rules and regulations which govern formation and performance of contract, including possible consequences of a breach, thereby giving the parties to contract the freedom to choose specific terms and conditions that would govern them in the performance of the contract including the specific consequences that may follow in case of breach/non-performance.⁵ Thus, the rights and duties of parties in relation to object sought to be achieved through contract, and terms of agreement are decided by the contracting parties themselves. The court of law acts to enforce agreement, in case of non-performance.⁶ The ICA consists of limiting factors subject to which contract may be entered into, executed and breach enforced.⁷

The ICA lays down three basic and essential requirements of a valid contract: i) offer, ii) acceptance of that offer, and iii) lawful consideration; other requirements being iv) free consent of the parties, v) lawful object, vi) competence of the parties, and vii) agreement being not expressly declared to be void under the ICA.⁸ As per § 2 (h) of the ICA, “an agreement enforceable by law is a contract”. Further, all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void.⁹ Also, the parties to contract must have the legal capacity to do so.¹⁰ There is no direct provision in the ICA requiring that an offer or its acceptance should be made with an intention to create legal relations.¹¹ The

¹ The author has restricted herself to the already available literature on the issues/perspectives and analysed the current law in its light. However, some case studies, as they have already been documented on the web, have been included to support the analyses or present the factual problem and discuss the surrounding legal issues.

³ Hereinafter referred to as ‘B-2-C contracts’.

⁴ Hereinafter referred to as ‘the ICA’.

⁵ See ROHAS NAGPAL, *ECOMMERCE – LEGAL ISSUES* 72 (2008).

⁶ ROHAS NAGPAL, *ECOMMERCE – LEGAL ISSUES* 72 (2008).

⁷ *Ibid.*

⁸ Under the English law, however, the condition of intention of the parties to bind them legally is also an essential requirement of a valid, enforceable contract; Rodney D. Ryder, *CLA – BL Supp. (Mag.) 2000, FORMATION OF A CONTRACT IN CYBERSPACE*, 115.

⁹ The Indian Contract Act, 1872, § 10.

¹⁰ This is provided for under the Indian Contract Act, 1872, § 11 as: “Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”

¹¹ AVTAR SINGH, *LAW OF CONTRACT AND SPECIFIC RELIEF* 13 (9th edn., 2005). Social relations may also at times give rise to binding legal contract. For example, in *Chandrakant Manilal Shah v. CIT*, (1992) 1 SCC 76, the Supreme Court of India observed that a contract of any kind including that of partnership between the undivided members of a Hindu family is possible.

intention to create legal relations is inferred from other essential elements of a formation of a valid contract.¹²

For each of the essential requirements of a valid contract, the ICA details out specifics to be adhered to in that respect. For example, an offer as well as an acceptance is valid and binding only if it is communicated to the person to whom it is made.¹³ Such communication is complete when the offer/acceptance comes to the knowledge of the person to whom it is made.¹⁴ Thus, if A, by a letter, proposes to sell a house to B at a certain price, the communication of A's proposal shall be complete only when B receives the letter.¹⁵ Similarly, the communication of B's acceptance shall be complete as against A when the letter of acceptance by B is posted so as to be out of his power, and leading to a legally binding contract between A and B.¹⁶ This rule known as the postal rule, is well established and was developed in the early 19th century as representing the fairest method of allocating the risk and consequences of letters going astray in the post.¹⁷ It may however, be noted that knowledge of the terms of the offer is essential for a valid and binding acceptance.¹⁸ Further rules of acceptance provide that acceptance must be absolute and unqualified and must be expressed in some usual and reasonable form.¹⁹ However, an acceptance may be given by performing the conditions of the offer.²⁰

Consideration is another essential requirement for the formation of a valid contract.²¹ Under the Indian Law, an agreement made without a consideration is void.²² Further, consideration for any promise/agreement is required under the Act to be lawful.²³ That is, such consideration must not be forbidden by law, or involve or imply injury to the person or property of another, or the Court regards it as immoral or opposed to public policy, or is

¹² However, in English law it is settled principle that "to create a contract there must be a common intention of the parties to enter into legal obligations," *ibid*.

¹³ The Indian Contract Act, 1872, § 3.

¹⁴ The Indian Contract Act, 1872, § 4. It provides: "Communication when complete.- The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge."

¹⁵ The Indian Contract Act, 1872, Illustration (a) to § 4.

¹⁶ The Supreme Court as far back as in 1966 held in *Bhagwandas Goverdhandas Kedia v. Girdhari Lal & Co.*, AIR 1966 SC 543, that it is the acceptance of the offer and intimation of that acceptance which results in a contract. A mere making of an offer does not form part of the cause of action for damages for breach of contract which has resulted from the acceptance of the offer.

¹⁷ RYDER, *supra* note 7, 118.

¹⁸ Thus where a person sent his servant in search of his missing boy and subsequently offered a reward to anyone who would find the boy, the servant, on finding the boy, could not claim the reward, as his search for the boy could not be regarded as a consideration for the promise of reward; *Lalman Shukla v. Gauri Datt*, (1913) 11 ALJ 489.

¹⁹ The Indian Contract Act, 1872, § 7.

²⁰ *Carlill vs. Carbolic Smoke Ball Co.*, (1893) 1 QBD 256.

²¹ The Indian Contract Act, 1872, § 2(d) defines 'consideration' as, "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstain from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise".

²² The Indian Contract Act, 1872, § 25.

²³ The Indian Contract Act, 1872, § 23.

fraudulent, or is of such a nature that if permitted, it would defeat the provisions of any law.²⁴ If a consideration or any part of it is unlawful, the agreement is void.²⁵ Thus, if A promises to give an iPod to B without any consideration, it is a void agreement. If however, A, for natural love and affection, promises to give her daughter, B, Rs.1,000, and puts her promise to B into writing and registers it, this is a contract.²⁶

Consideration under the Indian law needs to be of some value, however, it may not be adequate.²⁷ It must be however, real and not illusory even if it is not adequate; it must carry some value in the eyes of law.²⁸ Normally, the doctrine of freedom of contract permits the parties to an agreement the freedom to bargain as they wish but in extreme cases, a court may look into the amount or value (the adequacy) of the consideration.²⁹

In an online medium, the transaction is so fast that it may be difficult to pinpoint as to exactly when and where the contract is concluded. Further, the questions as to whether an offer was communicated to the buyer and whether the consumer's acceptance was "absolute and unqualified" remain unanswered. Though conduct under ICA constitutes a valid acceptance,³⁰ yet, an inadvertent user may enter into an online contract by mistake, or may not be aware of the complete terms and conditions of the contract. It may also be a case of acceptance without reading the terms of agreement.³¹

B. OFFER AND ITS ACCEPTANCE IN ONLINE MEDIUM

The digital medium, it may be seen, presents a dichotomy of offer and invitation to treat/offer. Therein, it is not easy to distinguish between offer and invitation to offer. A statement may actually be an invitation to treat although it contains the word offer.³² It may thus, depend on a case to case basis. Some authors maintain that statements on a website need to be judged by the language used and usage of trade. A statement on a website may be treated as an offer where the person making it intends to be bound as soon as the offeree accepts its terms but where it can be read from the language used in the statement that the seller is simply making known to others the terms on which he is willing to negotiate, he cannot be said to have made an offer but only an invitation to treat.³³ Notwithstanding the difficulty of distinguishing between an offer and an invitation to treat, there is a commercial expediency to maintain this dichotomy. Otherwise, the shopkeeper might be exposed to many

²⁴ *Ibid.*

²⁵ The Indian Contract Act, 1872, § 24.

²⁶ The Indian Contract Act, 1872, § 25(1) read with illustration (b) to § 25.

²⁷ Chidambara v. P.S. Renga, AIR 1965 SC 193.

²⁸ This was held by the Madras High Court in Kulasekaraperumal v. Pathakutty, AIR 1961 Mad 405.

²⁹ Warren H. Hyman, *Adequacy of Consideration and the Unconscionable Contract*, 86 *Com. L.J.* 500 (1981).

³⁰ The Indian Contract Act, 1872, § 3. It provides: Communication, acceptance and revocation of proposals.- The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptance, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

³¹ Parties to an electronic contract appear to conduct themselves and expect others to conduct themselves in the same manner as they have under traditional rules. However, in an electronic medium, this approach may not always fit the bill; see Donnie L. Kidd, Jr. and William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 *Rutgers Computer & Tech. L.J.* 215 (2000) (for a discussion on adapting law of contract in the US to e-contracts).

³² FAROOQ AHMAD, CYBER LAW IN INDIA (LAW ON INTERNET) 217 (2011).

³³ *Id.*, 218.

actions of damages if more customers purported to accept than his stock could satisfy.³⁴ Courts in India are inclined to maintain this distinction.³⁵

In an online medium, however, this difference may not be quite certain. The prime test to determine whether a statement is an offer or an invitation to treat is the intention of the parties.³⁶ However, there cannot be any rule of thumb applicable uniformly to all situations since websites fuse the advertising and the selling which makes application of general principles infeasible.³⁷ Thus, intention of the offerer may be derived from the statement on the website in as much as if it reflects that the offerer intends to be bound to comply upon acceptance of the terms the statement is an offer.³⁸

The ICA requires an acceptance to be a 'mirror image' of the offer, that is, the acceptance is to be only of the offer extended and is required to be absolute and unqualified.³⁹ Additional conditions introduced by an acceptor result in a counter proposal. When a counter proposal is accepted, a contract comes into existence and the terms of the contract are the terms of the counter proposal.⁴⁰ Thus, in case of standard contracts, which is the nature of most B-2-C contracts, the consumer is not offered the choice to negotiate the terms and a contract may be concluded as soon as the consumer hits 'order' or 'download'.

In the physical medium, goods displayed in, say a shop, do not amount to an offer, but to an invitation to an offer. In an online medium, however, a website 'offering' goods on sale is not inviting the general public to make an offer but offering to sell the displayed goods at the price mentioned/quoted therein. The exposure of goods by a shopkeeper does not amount to an offer to sell. It is only an invitation to the public/target audience/select few (in some cases), to make an offer to buy the advertised or displayed product at the fixed price or a bargained one. On picking the goods, it is an offer by the customer to buy, and sale is not effected until the buyer's offer price is accepted by the shopkeeper.⁴¹ However, in the online medium, the exposure of goods constitutes an offer. By clicking "buy" on an online portal, a buyer enters into a valid enforceable contract with the website. Online 'offers' may also be said to be general offers or offers to the whole world. Though an offer may be made to the whole world, a contract can arise only by acceptance of the offer by one particular identifiable person. Therefore, simply put, an offer by an online seller/distributor on an e-commerce portal will take shape of a legally valid and enforceable contract upon its acceptance by the consumer.

E-contracts are generally in the form of a standard form of contract where the terms are one-sided, with the consumer merely given an option to decide the place of delivery of goods, the mode of payment etc. The earliest forms of standard contracts can be found in the

³⁴ Farooq Ahmad, *Challenges of Information Technology to Existing Legal Regime: Common Law Principles No More Panacea*, 46 (3) JILI 428-442 (2004).

³⁵ Badri Prasad v. State of M.P., AIR 1970 SC 706; MC Pherna v. Appana, AIR 1950 SC 184.

³⁶ Assafa Endeshaw, *The Proper Law for Electronic Commerce*, 7(1) Information & Communication Technology Law 5 (1998).

³⁷ AHMAD, *supra* note 31, 218.

³⁸ It may however, be subject to stocks. A statement reflecting willingness to negotiate on the other hand is an invitation to treat.

³⁹ The Indian Contract Act, 1872, § 7.

⁴⁰ This is called the last shot doctrine which means that where conflicting communications are exchanged, each is a counter offer, so that if a contract results at all, it must be on the terms of the final document in the series leading to the conclusion of the contract; Farooq Ahmad Mir, *Mercantile Law* in ANNUAL SURVEY OF INDIAN LAW, 625, 626 (The Indian Law Institute, 2009).

⁴¹ *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.*, (1952) 2 QB 795.

railway corporations. The railway tickets purchased by the passengers contained the terms and conditions written on the back of the ticket.⁴²

Standard terms in traditional mercantile transactions were quite efficient since they did not present the consumer with unfair terms. They were negotiated over a period of time and had acquired a standard character only after they found general acceptance among the parties involved, thereby laying down the path for all future transactions.⁴³ Nowadays, in most cases, SFOCs tend to bend in the direction of the drafting party, generally being the multinational giant. The consumer's interests may therefore, be thrown away by giving a set of terms that limit the liability of the drafter/seller/service-provider and place the consumer in an extremely unfair position.

C. FORMATION OF CONTRACT

The ICA under § 4 incorporates the postal rule of communication however, with a modification to the effect that an offer is complete only when it comes to the knowledge of the offeree.⁴⁴ In case of e-contracts the offer and acceptance may be instantaneous and it may not be the case few times. A simple click to order a mobile phone from an online shopping portal/website leads to a complex electronic contract and an ordinary consumer may lack the capacity to understand the issues arising out of the same. For instance, in e-mail contracts, the recipient may not be aware of the acceptance till he checks his e-mail.⁴⁵ Here, since the acceptance is out of the hands of the offeree so as to be binding on him, as per the ICA, such acceptance is complete against the offeror and a valid contract has already arisen irrespective of whether the offeror has checked his messages or not. On the other hand, in case of website contracts, offer and its acceptance may be simultaneous and instant resulting in a binding contract upon a mere 'click' even when such click may be due to server error or by mistake on part of the consumer. Thus, both situations may be problematic for consumers and also the sellers/distributors.

⁴² These terms were standard in the sense that they were same for every passenger travelling by that train in the same class and were absolutely non-negotiable. The tickets for the waiting room on the platforms were also similar, i.e., with standard terms. In the words of the English judge, Lord Diplock, one kind of standard form of contract is of 'very ancient origin'. This kind is that,

"which set out the terms on which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade.;

as quoted in M.P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 25 (1st Indian edn., 2007).

⁴³ SFOCs had certain advantages, for example, they remarkably reduced transaction costs, especially in case of mass production and distribution, since for every transaction a new set of terms need not be negotiated. SFOCs further had the advantage of being uniform, thus ensuring uniform application.

⁴⁴ Thus, in *Lalman Shukla v. Gauri Dutt*, (1913) MLJ 489, the court refused to grant the reward to the servant upon finding the missing boy since the servant's actions were in line of following the orders of his master and he was unaware of the offer of the reward. In absence of communication of the offer to the servant, there existed no contract. For instantaneous means of communication like the telex in *Entores v. Miles Far East Corporation Ltd.*, 1955 (2) QB 327, 'receipt rule' was made applicable and it was held that in such cases the contract came into existence where the acceptance was received. This rule was followed by India in *Bhagwandas Goverdhandas Kedia v. Parshottamdas & Co.*, (1966) 1 SCR 656, where the Supreme Court confined the operation of § 4 to the postal communications, and laid down that in cases of instantaneous means of communication, the contract is concluded where the acceptance is received.

⁴⁵ There are more than one ways to form an online contract, like e-mail, filling out a website form, or online agreements, etc.; *supra* note 5, p. 73.

E-contracts in the form of old shrink-wrap contracts⁴⁶, or the new click-wrap contracts⁴⁷ derive an express legal validity and enforceability in the UNCITRAL Model Law on Electronic Commerce (1996) under § 11. The issue of shrink-wrap and click-wrap contracts first arose in the United States. The US Courts have faced the issue of clickwrap contracts in two ways. In *ProCD Inc. v. Zeidenberg*,⁴⁸ it was held that an enforceable contract emerged as soon as the product was used after the consumer had had the opportunity to read the terms.⁴⁹ However, in *Klocek v. Gateway, Inc.*,⁵⁰ the decision was that unless sufficient evidence of notice as well as that of acceptance of standard terms was presented, the terms were not binding on the parties. These decisions are divided on the issue of consent in the manner it is obtained. In *ProCD v. Zeidenberg*, the Court of Appeals, 7th Circuit upheld the shrink-wrap contracts/licences holding that once the software was opened for use, the user was given the option to either accept the terms of use or reject the same. Thus, it was a valid contract. It may be said that the rationale for enforcing click-wraps may be stronger than that for enforcing shrink-wraps, since the concern over unfair adhesion contract terms substantially reduces in the former as it requires an affirmative assent unlike shrink-wraps where assent to specific terms is required.

The law of contract is not averse to the present changes in the formation of contracts.⁵¹ Today contracts with banks, contracts with multinational companies, corporate and government contracts, contracts for fast-moving consumer goods, are all carried out in this fashion with much ease. It may be said that presently the Law of Contract is hitching over such kind of contracts generally.⁵² It would be difficult for large organizations to draw out a separate contract with every individual. They, therefore, use pre-determined forms of contract containing standardised terms. It may however, be noted that presently, there are no case law in India in respect of click-wrap, shrink-wrap or browse-wrap agreements.⁵³ However, they are likely to be upheld if they fulfil the essential ingredients of a traditional contract.

D. EFFECT OF FLAW IN CONSENT

Online transactions are contracts attracting principle of *uberrimae fidei* (i.e. good faith) in which the contracting parties are not dealing at arm's length but one party is entirely

⁴⁶ Shrink wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product; see ROHAS NAGPAL, IPR & CYBERSPACE – INDIAN PERSPECTIVE (2008). The term 'shrink wrap' describes the shrink wrap plastic wrapping used to coat software boxes, though these contracts are not limited to the software industry.

⁴⁷ A click-wrap agreement is mostly found as part of the installation process of software packages which may be either downloaded or used over the internet. It is also called a 'click through' agreement or click-wrap license. The name 'click-wrap' comes from the use of 'shrink-wrap contracts' in boxed software purchases where the term 'shrink wrap' refers to the shrink-wrap plastic wrapping used to coat software boxes, because such packaging makes it impossible for the buyer to have read the contract before completing the purchase.

⁴⁸ 86 F.3d 1447.

⁴⁹ See generally Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, available at <http://ssrn.com/abstract=287819> (Last visited on June 22, 2016).

⁵⁰ 104 F. Supp. 2d 1332.

⁵¹ These new kinds of standard contracts are generally computerized or pre-decided, thus, enabling the parties to conclude them within minutes and bind themselves legally to each of the standard terms.

⁵² Gokulesh Sharma, *Crisis of Standard Form of Contracts*, available at <http://drgokuleshsharma.com/pdf/STANDARD%20FORM%20CONTRACTS.pdf> (Last visited on June 18, 2016).

⁵³ KARNIKA SETH, COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS 65 (Updated edn., 2013).

dependent upon the information supplied by the other party on the basis of which alone the willingness to contract is expressed⁵⁴ (by the consumer). The chances of a flawed consent due to misrepresentation, false and misleading information in the form of advertisements, ingenuine products, internal defects in the products etc. are increased manifold in case of e-transactions. Such flawed consent may be a result of mistake or misrepresentation, or in some cases, fraud, and there being no meeting of minds, and thus, the contract, should be allowed to be avoided under the ICA.

The difficulty in online transactions is that the competence of one party entering into the contract is almost unknown to the other party.⁵⁵ In online contracts, chances of misrepresentation are high. They may be with respect to goods or with respect to identity of parties.⁵⁶ Often in online trading, the identity of parties is never certain. An online contract concluded under the mistake of identity should be void. However, a mistake as to identity is not addressed under the ICA or under the Consumer Protection Act, 1986.⁵⁷ Further, the attribution and deeming clauses of the Information Technology Act, 2000 call for further confusion in the matter. Although the Consumer Protection Act, 1986 caters to the welfare of the ordinary consumer, in cases of conflict, its provisions may not come in much use for the consumers, in case of e-contracts, since the IT Act has an overriding effect.⁵⁸

E. JURISDICTION

The substantive provisions of the ICA and the Code of Civil Procedure, 1908⁵⁹ lay down the rules to determine the jurisdiction and choice of law questions. Once the place of formation is ascertained the question of jurisdiction is simple to answer, however, the parties may still have the freedom to choose jurisdiction, as well the law that shall govern their contract. It may however, be unworkable if an innocent consumer is required to sue for his claims in a foreign jurisdiction and in accordance with foreign law merely because the website owner's place of business is situated outside India. With the CPC providing only for two possible places of jurisdictions to institute a claim⁶⁰, and the ICA for only the place of formation of contract, the average Indian consumer is most likely not to sue once wronged by any website in case of an electronic contract.

III. E-CONTRACT *VIS-À-VIS* THE INFORMATION TECHNOLOGY ACT, 2000

⁵⁴ SURINDER KAUR VERMA AND RAMAN MITTAL, LEGAL DIMENSIONS OF CYBERSPACE 81 (2004).

⁵⁵ *Id.*, 78.

⁵⁶ Problems relating to electronic B-2-C contracts as faced by e-consumers have been discussed in Part IV of this paper.

⁵⁷ Misrepresentation under § 18 of the Indian Contract Act, 1872, deals with misrepresentation with respect to information supplied by the person making it.

⁵⁸ The Information Technology Act, 2000, § 81 provides: The provisions of this Act shall have effect notwithstanding anything consistent therewith contained in any other law for the time being in force.

⁵⁹ Hereinafter referred to as 'the CPC'.

⁶⁰ The Code of Civil Procedure, 1908, § 19 provides as: "Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts."

One of the objectives of the Information Technology Act, 2000⁶¹ when it was enacted in 2000 was to legalize e-commerce.⁶² This objective is reiterated in the objectives of the IT (Amendment) Act, 2008.⁶³ Surprisingly, there was no express provision in the original IT Act validating contracts executed electronically.⁶⁴ This lapse was in spite of the fact that there was an express provision to this effect in the UNCITRAL Model Law on Electronic Commerce, 1996 which forms the basis of the IT Act as claimed in its statement of objects and reasons. § 10-A was inserted by the 2008 amendment to the IT Act which provides that where in a contract formation, the communication of proposals and acceptance thereof, the revocation of proposals and acceptance, as the case may be, are expressed in electronic form⁶⁵ or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose. The effect of this provision is that electronic contracts are legally valid contracts. However, the amendment falls short of explaining the principles of online contract formation. Thus, the courts may be required to fill in the gaps that may remain even after superimposing the principles of Indian Contract Law (including common law principles of contract) on electronic contracts.

A. FORMATION OF AN E-CONTRACT

Every e-record⁶⁶ has an originator. Electronic record is attributed to the originator if it is sent by the originator himself or by a person duly authorised by the originator or by an information system programmed by the originator to send a message automatically.⁶⁷ Thus, if 'A' uses her yahoo mail account to send an email to 'B', here, 'A' is the originator, while *yahoomail.com* is merely an intermediary. The said email will thus, be attributed to 'A', and not to the email portal. Such rules of attribution may in some circumstances put the originator at a huge risk especially in cases of time bound or urgent compliances. It is quite possible that a party may be liable for a breach of contract which can be attributed to him technically but which was concluded without his knowledge or authority.⁶⁸ Many of these situations would arise without any negligence or carelessness on either party's part.⁶⁹

The rule of attribution incorporated in the IT Act is rigid and is bound to cause inconvenience in many situations such as where an addressee knew or had reason to know that the message received by him is not that of the originator or where the originator has sent notice to the addressee before acting upon the message, that the message received by him is not his, or where error is apparent on the face of the record. Though the principle of

⁶¹ Hereinafter referred to as 'the IT Act'.

⁶² FAROOQ AHMAD, CYBER LAW IN INDIA (LAW ON INTERNET) 215 (2011).

⁶³ Farooq A. Mir & M. Tariq Banday, *Emerging Legal Issues of E-Commerce 2* (Sprouts: Working Papers on Information Systems, 10(131), 2010), available at <https://www.researchgate.net/publication/227859135> (Last visited on June 21, 2016).

⁶⁴ *Ibid.*

⁶⁵ The Information Technology Act, 2000, § 2(1)(r) defines 'electronic form' as "electronic form, with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device".

⁶⁶ E-record or electronic record is defined in the Information Technology Act, 2000, § 2(1)(t) as 'data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche'.

⁶⁷ As provided for in the Information Technology Act, 2000, § 11. The provisions of § 11 of the IT Act reflect the provisions of Article 11(1) of the UNCITRAL Model Law on E-commerce which recognizes that the parties may convey offer and acceptance through data message.

⁶⁸ AHMAD, *supra* note 63, 229.

⁶⁹ *Ibid.*

attribution has been borrowed from the UNCITRAL Model Law on E-commerce, however, the mitigating factors incorporated in the Model Law which make attribution principles inapplicable in certain circumstances. The Model Law has 'assuming clause' that entitles a person to assume that a data message is that of the originator where: (a) the addressee applied properly authentication procedure previously agreed to by the originator⁷⁰, (b) the data message resulted from the actions of a person who by virtue of its relationship with the originator had access to the originator's authentication procedures.⁷¹ However, the addressee is entitled to act on this assumption only up to the point it received notice from the originator that the data message was not that of the originator, or up to the point when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data was not that of the originator.⁷² Furthermore, where data message is that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption.⁷³ The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.⁷⁴

Once an offer or acceptance in the form of an electronic record has been sent, the next question is of its receipt considering the peculiar nature of electronic communications. Further, the ICA too mandates communication of an offer and an acceptance for it to be valid and binding. Such communication issue is resolved by § 12 of the IT Act, which elucidates the receipt rule and mandates acknowledgement of receipt of each and every message. It provides that when the originator has not specified that an acknowledgement of receipt is required in a particular format or method, an acknowledgement can be given through any communication by the addressee 'automated or otherwise' or by any conduct of the addressee⁷⁵ that reasonably indicates to the sender of the message that the electronic record has been received. In case the originator mandatorily requires a receipt of acknowledgement then unless such acknowledgement is received, the electronic record shall not be deemed to be sent by the originator.⁷⁶ Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him. The addressee may further specify a reasonable time by which the acknowledgment must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice

⁷⁰ UNCITRAL Model Law on E-commerce (1996), Article 13(3)(a).

⁷¹ UNCITRAL Model Law on E-commerce (1996), Article 13(3)(b).

⁷² UNCITRAL Model Law on E-commerce (1996), Article 13(4).

⁷³ See also Ulrich Magnus, *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996)* in GLOBAL TRADE LAW 10, 38 (2004).

⁷⁴ This 'attribution and assuming clause' approach of the Model Law has been adopted in many jurisdictions. Singapore has even gone a step ahead by including § 13(3) in the Singapore Electronic Transactions Act, 1998 that provides that the principles of attribution or assumption shall not operate where in all the circumstances of the case it is unconscionable for the addressee to regard the e-record as that of the originator or to act on that assumption.

⁷⁵ The Information Technology Act, 2000, § 2(1)(b) defines 'addressee' as a person who is intended by the originator to receive the electronic record but does not include any intermediary. Thus, in case an originator sends an offer to sell his car for Rs.2,00,000/- mistakenly to an email address wrongly typed instead of the one of originally intended person, the offer is not valid and hence, not binding on the originator.

⁷⁶ The Information Technology Act, 2000, § 12(2).

to the addressee, treat the electronic record as though it has never been sent.⁷⁷ In case of an acknowledgement vide an automated response if the auto response by 'X' to 'Y's' original message contains the message of 'Y' in addition to the auto response of 'X', it is sufficient acknowledgement of receipt of 'Y's' message by 'X'.⁷⁸

Next is the question of time and place of formation of an e-contract. According to § 13(1) of the IT Act, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator except as otherwise agreed to between the originator and the addressee. If the addressee has provided a designated address to receive electronic records, the receipt thereof will be inferred when the electronic record 'enters the designated computer resource'.⁷⁹ In case the e-record is sent to a computer resource that is not the designated computer resource, the receipt of such e-record shall occur at the time when such e-record is 'retrieved by the addressee'.⁸⁰ And if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.⁸¹ These rules of time of dispatch may be understood easily by way of an illustration: If a company claims that it can deliver music CDs within 48 hours of the time of receipt of email placing order at the designated email address of the company, the moment the customer 'B's' email to the designated email address of the company placing order of 10 music CDs reaches the server of the company, a binding contract comes into being. However, if such order by 'B' is placed at the company's general email address which is not the designated one, the order of 'B' shall be deemed to be received only when it is read by a person of the company authorised to access that email address. If the same company does not provide a designated email address for the purpose of placing order, the time of receipt of the order of 'X' shall be when 'X's' email at the general email address of the company reaches the company's server.

B. PLACE OF E-CONTRACT

According to § 13(3) of the IT Act, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business except as otherwise agreed to between the originator and the addressee.⁸² Thus, if amazon's server is located in the US, the e-message sent by a consumer resident in Delhi placing an order of kitchenware on amazon.in, to be delivered at his residence, from a train while it was running through Hyderabad, the order is deemed to be dispatched at Delhi. Under the ICA, the place of formation of contract is the place where acceptance is received, i.e. that place where communication of acceptance is completed as against the proposer. Thus, in the instant example, the e-contract is formed at Bangalore since the registered office of Amazon India is at Bangalore. However, as the CPC offers the plaintiff an option to institute a claim for wrongs with respect to movable goods at the place where wrong is done, which is the place of performance of contract, i.e. Delhi in the

⁷⁷ The Information Technology Act, 2000, § 12(3).

⁷⁸ KARNIKA SETH, COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS 75 (2013).

⁷⁹ The Information Technology Act, 2000, § 13(2)(a)(i). A 'computer resource' is defined under the Act as 'computer, computer system, computer network, data, computer data base or software'; § 2(1)(k) of the IT Act.

⁸⁰ The Information Technology Act, 2000, § 13(2)(a)(ii).

⁸¹ The Information Technology Act, 2000, § 13(2)(b).

⁸² If the originator or the addressee has more than one place of business, its principal place of business is considered to be the place of business. If the originator or the addressee does not have a place of business, his usual place of residence is deemed to be the place of business. Here, 'usual place of residence', in relation to a body corporate, is the place where the body corporate is registered; see the Information Technology Act, 2000, § 13(5).

instant example, in case of non-delivery of kitchenware ordered, the consumer may rightfully choose to sue Amazon India at Delhi. Here it is immaterial that the order was placed while the consumer was in Hyderabad.⁸³

Similarly, a consumer in case of e-contracts may also sue at the place where part of cause of action arises.⁸⁴ The difficulty as to assuming jurisdiction to try a case by reference to place of cause of action with respect to e-contracts was discussed and resolved by the High Court of Allahabad in *P.R. Transport Agency (PRTA) v. Union of India & Ors.*⁸⁵ The Court observed that in case of e-mail, the data (in this case acceptance of bid) can be transmitted from anywhere by the e-mail account holder. It goes to the memory of a 'server' which may be located anywhere and can be retrieved by the addressee account holder from anywhere in the world. Therefore, there is no fixed point either of transmission or of receipt.⁸⁶ However, by applying the principle contained in § 13(3) of the IT Act, the Court said that the acceptance of the tender will be deemed to be received by PRTA at the places where PRTA (i.e. the petitioner) had its place of business. The Court decided in favour of PRTA by holding that the acceptance was received by PRTA at Chandauli / Varanasi, Uttar Pradesh, and the contract was concluded by receipt of such acceptance, and since both these places are within the local limits of the jurisdiction, hence a part of cause of action had arisen in Uttar Pradesh and thus, the Court had territorial jurisdiction.⁸⁷

Mere making of an offer however, would not constitute 'cause of action'. Hence, the place where the offer is deemed to be made is irrelevant for the purposes of instituting a suit. This was held by the Supreme Court of India in *A.B.C. Laminant Pvt. Ltd. v. A.P. Agencies, Salem.*⁸⁸ The Court laid down that making of an offer at a particular place does not form part cause of action in a suit for damages for breach of contract.⁸⁹ Information available on a website may be offer or invitation to treat depending upon the intention conferred by the statements therein. Considering that invitation to treat is much less than an actual offer, mere access to a website shall thus, not give rise to any cause for action in respect of breach.

The opening words of § 13(1), (2) and (3) are "save as otherwise agreed between the originator and the addressee", indicating that parties are free to agree otherwise and agree to different terms as to time, manner and place of dispatch of e-records and make themselves binding to the same. Thus, similar to the ICA, the IT Act too recognises freedom to contract

⁸³ See the Information Technology Act, 2000, § 13(4) which provides that the provisions of § 13(2) (that lays down rules as to time of receipt of an e-record) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under § 13(3) (that lays down rules for place of dispatch and receipt of e-record).

⁸⁴ The Code of Civil Procedure, 1908, § 20(c) gives this right to the plaintiff.

⁸⁵ AIR 2006 All 23. Briefly, the facts of the case were: Bharat Coking Coal Ltd. (BCC) held an e-auction for coal in different lots. Petitioner's bid was accepted for 4000 metric tons of coal. The acceptance letter was issued vide e-mail to PRTA's e-mail address which email was received by the petitioner at Chandauli, Uttar Pradesh. Acting upon this acceptance, PRTA deposited the full amount through a cheque in favour of BCC which cheque was accepted and encashed by BCC. However, BCC did not deliver the coal to PRTA. Instead it e-mailed PRTA saying that the sale as well as the e-auction in favour of PRTA stood cancelled 'due to some technical and unavoidable reasons'. The reason for this cancellation was another bid for same coal that was slightly higher than that of PRTA. This higher bid could not be considered earlier due to some flaw in the computer or feeding of data. The respondent raised challenge to jurisdiction of the High Court of Allahabad on the ground that no part of cause of action arose within Uttar Pradesh.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ AIR 1989 SC 1239.

⁸⁹ The consumer can also not institute a consumer complaint at the place where offer was made.

and lays down guiding principles for contract formation in case of vacuum or otherwise like differences as to interpretation of terms of contract.

Most B-2-C electronic contracts are standard contracts. While offering goods for sale on a website a disclaimer is generally out stating that the sale shall be subject to terms and conditions. For example, *flipkart.com* endorses a separate section called 'help' on its website that incorporates all terms relating to payments, cancellation, returns, shipping etc. On placing an order the website provides for some hyperlinks which direct the consumer to the web-pages containing these terms. Though it is not specifically stated on the website, these terms are part of the contract by reference. Thus, a consumer is bound by them. It is not expected that every consumer shall read all these terms before placing the order, however, as per the general international rules of practice, these terms can be upheld in a court of law if they are surprising or inequitable.⁹⁰ The IT Act does not contain any express provision affording legal status to terms which are not in the main message but are only referred to in that message.⁹¹ There was also no provision for the same in the original UNCITRAL Model Law on E-Commerce. However, realizing the frequency with which hyperlinks were used for incorporating terms by reference, UNCITRAL made an express provision in the Model Law in 1998.⁹² Thus, Article 5 *bis* read as: 'Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.' Owing to the convenience that reference brings in e-contracts, incorporation by this manner can be given recognition under the IT Act. However, the e-consumer must be facilitated by specific and certain notice to such referred terms before the conclusion of electronic contract; i.e, before the order is placed.

IV. ISSUES IN ELECTRONIC CONTRACTS FOR B-2-C MODEL

E-commerce is commerce based on bytes.⁹³ Business-2-Consumer Model or B-2-C model of e-commerce is a popular model of commercial transaction of goods and services in electronic format. It refers to a business platform involving a business entity and consumers. It is a retail version of e-commerce- selling goods or services through Web based shops.⁹⁴

In case of e-contracts in B-2-C model, a buyer is never given an option to propose his conditions for the transaction. He has to accept the terms and conditions offered by the seller/distributor/online shopping portal. Freedom to contract is limited to a large extent since the buyer can only decide two things: place of delivery of goods and mode of payment. However breach of an online contract equally affects the consumers, for example when promised goods are not sold or when a consumer receives incomplete goods or does not receive them at all.

Some instances of online breach include: the promise by *flipkart.com* to deliver a specific model of an electronic item, and later when the increased price is announced by the manufacturer, the online distributor/intermediary (flipkart) backing out from delivering the

⁹⁰ Though the principle of 'buyer beware' should be encouraged, yet no website or business entity should be allowed under law to take unnecessary and unfair advantage of the unequal bargaining position.

⁹¹ AHMAD, *supra* note 61, 228.

⁹² This is a classic example where law has caught up with the changing business practices instead of *vice versa*.

⁹³ SURINDER KAUR VERMA AND RAMAN MITTAL, LEGAL DIMENSIONS OF CYBERSPACE 51 (2004).

⁹⁴ *Id.* at p.53.

ordered good citing reason of “non-availability”. Another example includes that of breach by ferns and petals.com of having not delivered the same product that had been advertised on its website.

The threshold issue of any discussion of contract law is freedom of contract, because this issue defines the scope of the subject and marks the boundaries between public and private law-making.⁹⁵ It has, however, been argued that there is a fatal error in this simplistic approach since electronic contracts do not always fit the traditional framework that structures general contract law.⁹⁶ Electronic contracts may never appear on a piece of paper, may involve instantaneous transactions, may involve minimal or no negotiation or interaction, and may involve no human interaction at all; in that they can be swift, inhuman affairs.⁹⁷ Almost all online interactions are governed by standard terms incorporated in standard form of contracts.⁹⁸ Examples also include contracts entered into by ordinary average users on e-commerce portals, online social networking websites etc. It is usually the standard contract of the party who is in a stronger bargaining position that governs the situation.⁹⁹

A specific problem in respect of standard online contracts is that of incorporation of additional terms that may or may not be by way of reference. Where the incorporation of standard terms have been expressly agreed upon by the parties no problem arises, but quite often the incorporation of the standard terms takes place by a mere reference in an oral communication or written communication to the inclusion of such terms.¹⁰⁰ Sometimes the text of the standard terms will accompany the main agreement, for instance being printed on the back of an order form, but quite often the contract merely contains an incorporation clause without any accompanying text.¹⁰¹ The question then arises whether there has been a valid incorporation or not.¹⁰²

A. INSTANCES OF PROBLEMS OF CONSUMERS IN ELECTRONIC CONTRACTING

The traditional principles of contract law clearly specify as to who is incapacitated from entering into a contract.¹⁰³ The difficulty in online transaction is that the competence of

⁹⁵ Avery Wiener Katz, *Is Electronic Contracting Different? Contract Law in the Information Age*, 2004, available at https://law.utexas.edu/wp-content/uploads/sites/25/katz_is_electronic_contracting_different.pdf (Last visited on June 20, 2016).

⁹⁶ Donnie L. Kidd, Jr. and William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 *Rutgers Computer & Tech. L.J.* 215 (2000).

⁹⁷ *Ibid.*

⁹⁸ Shmuel I. Becher and Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 *Mich. Telecomm. Tech. L. Rev.* 303 (2008), available at http://archive.nyu.edu/bitstream/2451/28033/3/location_reviews2.pdf.txt (Last visited on June 18, 2016).

⁹⁹ S. Eiselen, *The Requirements for the Inclusions of Standard Terms in International Sales Contracts*, 14(1) *PER/PELJ* 2 (2011).

¹⁰⁰ This is especially the case in international sales contracts; see CISG-AC Opinion No. 13, *Inclusion of Standard Terms under the CISG* (January 20, 2013).

¹⁰¹ *Ibid.*

¹⁰² Sonja A. Krusinga, *Incorporation of Standard Terms under the CISG and Electronic Communication in THE 2ND ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE* 69 (2011), available at <http://dspace.library.uu.nl/handle/1874/241956> (Last visited on June 19, 2016).

¹⁰³ As discussed in Part II this paper.

one party entering into the contract is almost unknown to the other party.¹⁰⁴ Some instances of problems faced by the consumers in India over contracts entered online¹⁰⁵ are as under¹⁰⁶:

1. The online e-commerce portal *flipkart.com* accepted the orders, and then cancelled them after an extended period of waiting citing the reason as “product not in stock” despite the website still flashing the product as available.¹⁰⁷ The complainant continues: “In one particular case, they cancelled a friend’s order for the Canon 85mm f/1.8 lens because he placed it one day before the infamous 30% price hike in Canon lenses. Flipkart promptly cancelled his order (because the difference between the old and new price was Rs. 8,000) and told him the lens was out of stock, while their website continued to advertise the lens as available, at the new price. It was evident they did not want to honour his order, despite it being placed in timely fashion before the price hike.”¹⁰⁸
2. In another instance, the author had ordered a ‘*rakhsha bandhan* set’ from *fernsandpetals.com*. The website clearly and specifically with pictures mentioned the items that were included in the set. The main attraction was a traditional storage box that came along with the *rakhi*. The payment was made online before the delivery of the product as the website did not offer ‘cash on delivery’ option of payment. The received product was non-conforming to the promised items as the traditional box was missing. The author wrote to the website and was promised a replacement soon. The product was delivered again without any further payment and there was no request for return of the first delivered product. To the surprise of the author, the new product was again missing the traditional box, and upon writing again, the website emailed the screenshot showing ‘in transit’ delivery status for the first product. By this time, the festival for which the product had been ordered was well over!
3. In yet another instance, websites upon cancelling the order provide the option to the consumer for keeping the already paid amount in the ‘wallet’ of the website, i.e., it is kept as credit in the account of the company from the consumer. The money is not refunded and the consumer is forced to buy from the same website again.

V. REMEDIES TO BREACH OF CONTRACT IN INDIAN LAW

The ultimate intention of any contract is its performance as agreed between the parties. However, non-performance or incomplete performance of a contract results in its breach. Chapter VI of the ICA, i.e. § 73 to 75, sets down consequences for breach of

¹⁰⁴ VERMA & MITTAL, *supra* note 92, 78.

¹⁰⁵ These instances were documented over the web forums of discussion and in the feedback sections of some websites and were taken notice by the author during research.

¹⁰⁶ The websites and instances shared herein are merely for academic purposes. The author does not in any way intend to harm the reputation of any website or its owner(s) and distributors.

¹⁰⁷ Swapnil Mathur, *Flipkart screwed me over: Here’s how they could stick it to you as well*, available at http://www.thinkdigit.com/Internet/Flipkart-screwed-me-over-Heres-how-they_17224.html (Last visited on June 20, 2016).

¹⁰⁸ *Ibid.*

contract.¹⁰⁹ Liquidated damages may also be awarded to the other party from the party that infringed the contract in case the contract provides for a specific amount to be paid upon its breach.¹¹⁰ The benefit of § 74 is that the party suffering breach is not required to prove any loss or damage to him as a result of the breach of contract. It is enough if violation of contract has occurred and the contract specifically provided for a penalty thereto.¹¹¹ It is important to differentiate between the § 73 and 74 to ascertain liability of the party committing breach. Under § 73, the party suffering loss needs to establish by way of proof that it has suffered loss or damages as a natural and probable result of breach of contract by the other party and upon doing so, the court may grant a ‘reasonable compensation’ to the party that suffered such loss. The damages, however, cannot include compensation for any remote and indirect loss or damages sustained by reason of the breach.¹¹² In case of liquidated damages, § 74 of the ICA comes into play and the only fact required to be established by the party suffering breach is that the contract provided for a penalty in respect of its violation. The court may thus, grant compensation as deemed reasonable to it, however, such compensation cannot exceed the amount specified as penalty in the contract. Further, a party rightfully rescinding a contract is entitled to compensation suffered at his end from the non-fulfillment of the contract.¹¹³

The law in India with respect to liquidated damages if provided for in the contract while foreseeing a breach stands clarified by the Supreme Court of India in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*¹¹⁴ The Court ruled that when the terms of the contract were clear in expressing the intention of the parties, such terms were to be given effect to.¹¹⁵ The Court further held that in case of liquidated damages provided within the contract, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach.¹¹⁶

¹⁰⁹ The Indian Contract Act, 1872, § 73 provides: “Compensation of loss or damage caused by breach of contract: When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach.”

¹¹⁰ Thus, the Indian Contract Act, 1872, § 74 provides as: “Compensation of breach of contract where penalty stipulated for: When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

¹¹¹ For an example: If ‘A’ contracts with ‘B’ that, if ‘A’ practises as a surgeon within Calcutta, he will pay ‘B’ Rs. 5,000. ‘A’ practises as a surgeon in Calcutta. ‘B’ is entitled to such compensation; not exceeding Rs. 5,000 as the court considers reasonable; Indian Contract Act, 1872, Illustration (b) to § 74.

¹¹² *Hadley & Anr. v. Baxendale & Ors.*, (1854) EWHC Exch J70. Also see *Karsandas H. Thacker v. Saran Engg. Co. Ltd.*, AIR 1965 SC 1981, where the Supreme Court held that damages under a contract are to be awarded as compensation for any loss or damage arising naturally in the usual course of things from the breach of contract.

¹¹³ The Indian Contract Act, 1872, § 75.

¹¹⁴ (2003) 5 SCC 705.

¹¹⁵ In this case, the parties incorporated a clause in their agreement that liquidated damages in case of delay shall not be by way of a penalty but it would be an “agreed, genuine pre-estimate of damages” in case of failure of delivery by the contractor within the period fixed; T. Ramappa, *‘Proof of Loss or Damage’ under Section 74 of the Contract Act, 1872*, 39(8) Chartered Secretary 1066-69 (2009).

¹¹⁶ Under the UNIDROIT Principles of International Commercial Contracts, 2010 any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies (Article

For the purpose of enforcing individual civil rights, the remedy of specific relief can be claimed.¹¹⁷ Though the Specific Relief Act, 1963¹¹⁸ provides for principles guiding the relief of specific performance of a contract, this remedy is largely dependent on the discretion of the courts. Courts are not bound to grant such relief merely because it is lawful to do so.¹¹⁹ However, the discretion of the court is not to be arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.¹²⁰

§ 10 provides for cases in which specific performance of contract may be enforceable in the discretion of the court. These include cases when, (a) there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done, (b) the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.¹²¹ On the other hand, a contract for the non-performance of which compensation is adequate relief is not enforceable specifically. Other similar situations are where contract runs into minor details, or where performance of a contract involves performance of a continuous duty which the court cannot supervise.¹²² An important remedy available under the SR Act is specific performance despite a sum fixed in the contract to be paid in the event of breach.¹²³ However, this remedy is available only if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named in the contract only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.¹²⁴

VI. CONCLUSION

Electronic contracts simplify daily transactions for an e-consumer to a large extent. However, they also give rise to issues of free consent and freedom to contract. Caution on part of the consumer cannot be the only remedy for problems faced by e-consumer. Further,

7.4.1). The aggrieved party under these Principles is also entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm; it may even be non-pecuniary and includes, for instance, physical suffering or emotional distress (Article 7.4.2). The aggrieved party is however, in order for it to be entitled to compensation for harm including future harm, required to establish such harm with a reasonable degree of certainty (Article 7.4.3). Further, compensation may also be due for the loss of a chance in proportion to the probability of its occurrence. Also, where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

¹¹⁷ The Specific Relief Act, 1963, § 4.

¹¹⁸ Hereinafter called the SR Act.

¹¹⁹ See Supreme Court ruling in Ramesh Chand (Dead) through L.Rs. & another v. Asruddin (Dead) through LRs & another, Civil Appeal No. 8427 of 2014 (2015).

¹²⁰ The Specific Relief Act, § 20(1); *ibid*.

¹²¹ In cases of breach of a contract to transfer movable property it is presumed, unless and until the contrary is proved, that such breach can be so relieved except in cases where (a) the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market, or (b) the property is held by the defendant as the agent or trustee of the plaintiff; Explanation (ii) to The Specific Relief Act, § 10.

¹²² The Specific Relief Act, § 14(1). Contracts giving unfair advantage to the plaintiff, or its performance causes previously unforeseeable hardship to the defendant but not to the plaintiff, or circumstances render the enforcement of specific performance of the contract inequitable are cases where no decree of specific performance can be granted; the Specific Relief Act, § 20(2).

¹²³ The Specific Relief Act, § 23.

¹²⁴ The Specific Relief Act, § 23(1).

remedies available under the Indian Contract Act may not be feasible for easy solutions. E-consumers therefore, require creative or at least easily accessible solutions in limited time-span for daily dishonoured e-contracts. The liability, upon breach of e-contract, of the e-commerce portals needs to be appropriately located within the legal framework for a smoother, convenient and better B-2-C model of electronic commerce.